Nos. 75-143 and 75-146

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

STANLEY DUBOFF, PETITIONER

v.

UNITED STATES OF AMERICA

BERNARD DEUTSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the information under which they were tried was insufficient to inform

them of the charges against them, that the evidence adduced at trial proved crimes in addition to those charged in the information, and that the charge to the jury was inadequate.

After a jury trial in the United States District Court for the Southern District of New York, petitioners and co-defendant Milton Cohen were convicted on all four counts of an information charging them with conspiracy to violate the securities laws and to commit mail fraud by manipulating the common stock of Richard Packing Company, in violation of 18 U.S.C. 371 (Count 1); fraud in the offer and sale of such stock, in violation of 15 U.S.C. 77q and 77x and 18 U.S.C. 2 (Counts 2 and 3); and mailing a false and misleading offering circular for a public offering of such stock, in violation of 15 U.S.C. 77j, 77x, 17 C.F.R. 230.256, and 18 U.S.C. 2 (Count 4). Each petitioner was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed in a comprehensive opinion, upon which we rely (Pet. App. 1a-21a; 518 F.2d 727).[1]

1. Petitioners contend that the information under which they were tried was not sufficiently specific.[2] Count 1 charges that from July 1968 to July 1970 petitioners, co-defendant Cohen, and others conspired

[1] "Pet." refers to the petition in No. 75-143.

[2] At the suggestion of the trial court, and with the consent of the parties, the sixteen-count indictment was superseded by the four-count information; the parties agreed that the information would be treated as if it were the indictment (Pet. 2-3).

to commit securities fraud and mail fraud in connection with a purported public offering of common stock of Richard Packing Company; that as part of this plan petitioners used the mails to transmit false and misleading information concerning a purported public offering of such stock, for which a Form 1-A notification had been filed with the Securities and Exchange Commission; and that petitioners made false and misleading statements of material facts and used the mails as part of the plan (Inf. 2-3).[3]

Count 1 alleged that petitioners and others used the following means to carry out the conspiracy: Between July 1968 and July 1970, for the purpose of inflating the price of Richard Packing common stock, petitioners caused accounts that they controlled to purchase and sell Richard Packing stock so as to restrict the available supply of the stock to the investing public and to create an appearance of demand and market activity; that in October 1969 petitioners arranged with the brokerage firm of Kelly, Andrews, and Bradley (KAB) and others to trade in the stock according to petitioners' directions and to pay them a secret kickback of 30 percent on the profits derived therefrom; that this profit, which amounted to approximately $15,000, was deposited in a Swiss account by KAB for petitioners; that petitioners caused KAB and co-conspirator Bernard Shwidock (the president of KAB) to sell 10,000

[3] A copy of the information ("Inf.") is being lodged with the Clerk.

shares of the stock, which were purportedly being offered to the public, to accounts that they controlled; that beginning about March 1969, they induced named mutual funds in Denver, Colorado, to buy stock from accounts, which they controlled, through Jaffee and Company, brokers, again for the purpose of raising the price, restricting the available supply to the investing public and creating an appearance of demand for the stock; that by these practices they caused the price of the stock to rise from $25 to $53 per share, but that eventually these mutual funds suffered losses approximating $5.1 million; that on March 11, 1969, petitioners caused an offering circular to be filed with the Securities and Exchange Commission; and that the offering circular was false and misleading because it failed to disclose that the 10,000 shares purportedly being placed on the market were actually being placed with accounts controlled by petitioners and through which petitioners' co-conspirators were receiving compensation (Inf. 3-6; see Pet. App. 10a).

Count 2 alleged that from March 11, 1969, to July 1970, petitioners committed the substantive acts alleged in Count 1 and made various specified mailings (Inf. 7-8).

Count 3 alleged that from March 11, 1969, to July 1970, petitioners obtained money by false statements of material facts. This count incorporated the allegations of Count 1 and alleged that petitioners used the mails to communicate with Financial Dynamics of Denver, a mutual fund (Inf. 9-10).

Count 4 alleged that on or about March 11, 1969, petitioners used the mails to send (to the persons named in Counts 2 and 3) false and misleading offering circulars that purported to offer 10,000 shares of stock to the general public but which in fact were being sold exclusively to accounts controlled by petitioners (Inf. 10-11).

Neither petitioner moved before trial to dismiss the indictment, from which the information was adapted (Pet. App. 14a). As a result of pre-trial conferences, the government provided all defendants with a bill of particulars. The bill of particulars, and its amendments, set out full details concerning the controlled accounts of various firms and individuals, by which the price of the stock was manipulated (Pet. App. 13a-14a). Petitioners were afforded full access to the prosecution's investigatory and trial preparation files (Pet. App. 14a).

2. Petitioners claim that the information "failed to describe the scheme to defraud, identify the persons defrauded, the time when they were defrauded or the nature of the money lost" (Deutsch Pet. 9). This is inaccurate. The information described, in the detail we have narrated above, the outlines of petitioners' program to inflate the price of Richard Packing shares and collect kickbacks from trading. The details of the operation were further spelled out in a bill of particulars. Not only was the scheme itself and its operation fully described in the information and bill of particulars, but the information also alleged that the principal persons defrauded were the

three Denver affiliated funds, which purchased three quarters of the shares and lost approximately $5.1 million when, as was inevitable, the stock collapsed (Pet. App. 8a-11a).

The information thus set out the elements of the offense charged and apprised petitioners of the charge they were required to meet; the information was specific enough to protect petitioners against being placed in jeopardy once more for the same offense. *Russell* v. *United States*, 369 U.S. 749, 763-764; *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Mann*, 517 F.2d 259 (C.A. 5). Petitioners appear to contend that the information was defective because it did not narrate the government's evidence in greater detail. That, however, is not its function.[4] See *Hamling* v. *United States*, 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself * * *."

Moreover, it has long been settled that an indictment charging conspiracy to commit an offense need not allege with technical precision all the elements essential to the commission of the offense that is the object of the conspiracy. *Wong Tai* v. *United States*, 273 U.S. 77, 81; *United States* v. *Perez*, 489 F.2d 51, 70 (C.A. 3), certiorari denied, 417 U.S. 945. Petitioners' claim that they were surprised by the proof offered by the government is not well founded; they failed to file any pretrial motion challenging the sufficiency of the information, and they had complete access to the government files in their preparation for trial (Pet. App. 14a-15a).

[4] *United States* v. *Hess*, 124 U.S. 483, 484, upon which petitioners rely, does not support their position. The indictment there alleged, in the most perfunctory manner, a scheme to defraud but did not identify any particulars of the scheme. The information in this case identified the scheme and supplied considerable factual background.

3. There was no prejudicial variance between the conspiracy charged and the conspiracy proved at trial. The court of appeals exhaustively summarized the evidence (Pet. App. 2a-10a) and correctly concluded: "The information provided enough detail about major fraudulent acts of the three defendants to permit the admission of evidence of related facts shown to be and proved to be in furtherance of the conspiracy" (Pet. App. 13a).

4. Petitioners' complaint that the grand jury that returned the original indictment may never have been acquainted with some of the evidence presented at trial is not relevant. The function of that body is to ascertain the existence of probable cause, not to review all of the evidence that can be presented at trial. An indictment valid on its face is not subject to attack predicated on the nature of the evidence presented to the grand jury. *United States* v. *Calandra*, 414 U.S. 338, 345; *Costello* v. *United States*, 350 U.S. 359.

5. Finally, petitioner Duboff's assertion, without supporting argument, that the court's charge left the jury confused about which misrepresentations might be used to convict petitioners (Duboff Pet. 2), is not supported by the record (see, *e.g.*, Tr. 5285,

5313, 5321). As the court of appeals held: "The instructions of the judge to the trial jury were concise and clear and included all the requisite elements which the jury was required to consider in order fairly to resolve the defendants' innocence or guilt" (Pet. App. 20a).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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